United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 08-1679**
	)	**Issued: June 11, 2009**
DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Seattle, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 31, 2007 merit decision, denying his claim for a recurrence, and a December 6, 2007 nonmerit decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a recurrence on January 13, 2007 causally related to his September 2, 2000 work injury; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 2, 2000 appellant, then a 35-year-old wiper, injured his lower back while lowering a heavy ship-to-shore power cable. He subsequently left federal service and on March 19, 2001 began working as an oilier for Washington State Ferries. On July 25, 2002 the

Office accepted appellant's claim for a herniated L4-5 disc.[1] The record reveals that he reached the maximum medical improvement for his back injury some time prior to November 2004. On March 24, 2006 appellant's case was administratively closed due to medical inactivity since August 23, 2005.

On January 24, 2007 appellant was treated by Dr. Michael McManus, Board-certified in occupational medicine, for chronic mechanical low back pain. He claimed that 10 days prior he experienced immediate pain and tightness while greasing his tractor at home. Appellant attempted to self-treat his pain before seeking treatment at an urgent care facility. Dr. McManus diagnosed an aggravation of chronic mechanical low back pain with spondylosis, degenerative disease, and probable mild spondylolisthesis with spondylosis and right disc protrusion. He noted that appellant's condition was work related. X-rays taken on January 25, 2007 revealed a degenerative change in appellant's lower lumbar spine with slight disc narrowing.

In a February 7, 2007 medical report, Dr. McManus noted a worsening of appellant's condition and diagnosed recurrent aggravation of chronic mechanical low back pain with spondylosis, possible mild spondylosthesis, right paracentral disc protrusion and mild right radicular symptoms. He again noted that appellant's condition was work related.

On April 27, 2007 appellant filed a claim for a recurrence of his September 2, 2000 employment injury, requesting only medical treatment. He listed January 13, 2007 as the date of recurrence, explaining that he greased his tractor in the backyard and a short time later he could not stand up straight due to severe back pain. Appellant alleged that, after returning to work, his condition had been irregular and that he experienced episodes of back pain from bending, lifting, sitting or standing for long periods of time.

In a medical report dated March 30, 2007, Dr. McManus requested that the Office reopen appellant's case. After describing appellant's accepted work injury and diagnosis, he stated that appellant had recently aggravated his low back condition.

In response to an April 27, 2007 Office letter requesting additional information, Dr. McManus submitted a medical report dated May 4, 2007. He noted that appellant was originally injured on September 2, 2000 resulting in permanent aggravation of lumbosacral spondylosis and degenerative disease with L4-5 and L5-S1 disc protrusions and mild instability. Dr. McManus stated that appellant was predisposed to recurrent injuries, including spondylosis, degenerative disease and disc protrusions, as well as intermittent episodes of increased low back pain and spasms and right lumbar nerve root irritation. Such an episode occurred on January 13, 2007 while appellant was oiling his tractor. Dr. McManus contended that appellant's present diagnosis of recurrent aggravation of chronic mechanical low back pain and chronic right lumbar radiculopathy were due to the progression of the original September 2, 2000 work injury.

In a May 18, 2007 letter, appellant responded to the Office's April 27, 2007 request for additional information. He stated that, on January 13, 2007, he was greasing a small yard tractor

[1] Appellant filed four claims (Form CA-7) for compensation for the periods October 25 through December 16, 2000, December 31, 2000 through January 18, 2001, January 15 through February 1, 2001 and February 2 through 24, 2001.

and, while bending at the knees with his hips forward, he felt the same severe pain in his lower back and right leg as he had experienced on and off since his September 2, 2000 employment injury. Appellant maintained that he sustained frequent aggravations to his lower back since his injury, requiring long periods of recovery with no lost time at work or restrictions.

On May 31, 2007 the Office denied appellant's claim for a recurrence of his accepted work injury. It found that the January 13, 2007 event materially altered the course of appellant's underlying condition and constituted a new aggravation due to factors external of his federal employment.

Appellant requested reconsideration of the merits of the claim on November 5, 2007. In an October 22, 2007 letter, he advised that he was submitting new medical records for the period the Office found his case was inactive. Appellant also alleged that the pain in January 2007 was an increase in existing pain, not a new onset. He submitted duplicate copies of Dr. McManus' March 30 and May 4, 2007 medical reports, as well as other records dated March 31, 2006 through July 27, 2007 addressing his continued flare-ups of back pain.

In a June 19, 2007 medical report, Dr. McManus addressed the relationship between appellant's current back condition, and the September 2, 2000 work injury. He reported that appellant's work injury caused permanent aggravation of his lumbosacral spondylosis and degenerative disease with disc protrusions and mild instability. Dr. McManus argued that this condition would predispose appellant to recurrent injuries or aggravations and was a chronic condition. He noted that appellant aggravated his chronic condition while twisting, bending and reaching while oiling his tractor on January 13, 2007.

In a December 6, 2007 decision, the Office denied further review of the merits, finding that appellant did not advance a new legal contention and that the newly submitted evidence was duplicative, repetitive and irrelevant. It also stated that two medical records documented intervening events, including lifting a loom and greasing a tractor and, therefore, did not support appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of a medical condition is defined as "the documented need for further treatment of the accepted condition when there has been no work stoppage."[2] A claimant who claims a recurrence of a medical condition due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the condition for which he claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician, who on the basis of a complete and accurate factual and medical history, concludes that the medical condition is causally related to the employment injury and supports that conclusion with sound medical

[2] *J.F.*, 58 ECAB ___ (Docket No. 06-186, issued October 17, 2006); *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(a) (January 1998).

reasoning.[3] Where no such rationale is present, medical evidence is of diminished probative value.[4]

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause attributable to employee's own intentional conduct.[5]

ANALYSIS -- ISSUE 1

The issue is whether appellant sustained a recurrence of his accepted condition causally related to the September 2, 2000 accepted work injury commencing January 13, 2007. The Board finds this case is not in posture for decision.

Appellant stated that, on January 13, 2007, he was greasing his tractor while bending at the knees with his hips forward, and experienced a recurrence of his accepted herniated L4-5 disc. He provided medical reports from Dr. McManus dated January 24 through May 4, 2007, who diagnosed mechanical low back pain with spondylosis, degenerative disease and probable mild spondylolisthesis with spondylosis and right disc protrusion. Dr. McManus advised that appellant's back condition was due to the accepted injury. In the May 4, 2007 medical report, he discussed appellant's accepted September 2, 2000 work injury and opined that it predisposed him to intermittent episodes of increased low back pain and recurrent injury, including spondylosis, degenerative disease and disc protrusions. Dr. McManus stated that appellant experienced one of these episodes on January 13, 2007 while oiling his tractor and that his current condition was a progression of his original September 2, 2000 work injury.

The Board finds that appellant established a *prima facie* claim that he experienced a recurrence of his September 2, 2000 employment injury on January 13, 2007. While Dr. McManus did not provide a fully rationalized opinion explaining causal relationship, he consistently indicated that appellant sustained a reaggravation of his accepted medical condition and that his need for treatment as of January 13, 2007 was related to his accepted herniated disc. His reports are not contradicted by any substantial medical or factual evidence of record. Thus, while the medical evidence is not sufficient to meet appellant's burden of proof to establish his claim, it raises an uncontroverted inference between the claimed recurrence and the accepted condition.[6]

Moreover, the Board finds that appellant's bending at the knees while greasing his tractor on January 13, 2007 does not constitute an intervening event. The Board has held that, when the primary injury is shown to have arisen out of and in the course of employment, every natural

[3] *See I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008)*; Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[4] *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[5] *See* A. Larson, *The Law of Workers' Compensation*, § 10.01 (2005); *Debra L. Dillworth*, 57 ECAB 16 (2006).

[6] *See Mary A. Wright*, 48 ECAB 240 (1996).

consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause that is attributable to the employee's own intentional conduct. Once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that would not be unreasonable under the circumstances.[7] Here, appellant experienced a back pain while greasing his tractor and bending at the knees. It is neither immediately apparent how this activity could be considered rash or that it was associated with an exertion that would be deemed unreasonable under the facts presented.

This case is distinguishable from *John R. Knox*,[8] where the employee sustained injury while playing basketball, which broke the chain of causation concerning his accepted left knee injury. The Board found that playing basketball was not a reasonable activity in light of appellant's left knee condition as the exertion he placed on the knee caused further knee injury, thereby constituting an independent, intervening cause resulting from his own intentional conduct.

Similarly, in *Robert J. Wescoe*,[9] appellant played volleyball while on light duty for a shoulder injury after being advised by his physician that he was prone to shoulder dislocations. The Board found, citing to *Knox*, that it was unreasonable for the employee to participate in playing volleyball in light of the fact that he was advised of his susceptibility to further dislocations. Thus, the Board held that playing volleyball was an independent, intervening cause attributable to his own intentional conduct.

Unlike the *Knox* and *Wescoe* cases, appellant described bending of the knees while greasing his tractor. This does not constitute an intervening event that would break the natural progression of his accepted back injury. There is no evidence of record that this activity was rash in light of his accepted herniated disc condition, thereby rendering the injury as a result of his own intentional conduct such that it can be considered an independent, intervening cause.

It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office shares the responsibility in the development of the evidence.[10] The Board finds that the medical evidence is sufficient to require the Office to further develop the medical evidence. The case will be remanded for further development.[11]

[7] *John R. Knox*, 42 ECAB 193 (1990).

[8] *See id.*

[9] *See Robert J. Wescoe*, 54 ECAB 162 (2002).

[10] *See Richard Kendall*, 43 ECAB 790 (1992); *Isidore J. Gennino*, 35 ECAB 442 (1983).

[11] *See e.g., Mark A. Cacchione*, 46 ECAB 148 (1994); *Lourdes Davila*, 45 ECAB 139 (1993).

CONCLUSION

The Board finds that this case is not in posture for decision with regard to whether appellant sustained a recurrence of his accepted September 2, 2000 medical condition commencing on January 13, 2007. Given the Board's findings regarding the merit issue of this case, it is unnecessary for the Board to consider the nonmerit issue in this case.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 6 and May 31, 2007 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 11, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board